HARRIS ADACOM CORPORATION

v.

PERKOM SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[ORIGINATING SUMMONS NO. R1-24-85 OF 1991]
10 DECEMBER 1993

PRACTICE & PROCEDURE: Application by plaintiff to register foreign Arbitrator's Award for enforcement - Defendant indebted to foreign corporation under Distribution Agreement - Foreign corporation selling and assigning all rights to plaintiff - Whether assignment valid under Malaysian law - Section 4 Civil Law Act 1956 - Whether notice of assignment given to defendant - Whether assignment can only be to a subsidiary of foreign corporation - Contention that plaintiff is an Israeli registered company - Whether enforcement of Award against public policy - Plaintiff also registering Award in Superior Court of Columbia - Whether plaintiff seeking double claim - Consideration of ss. 3, 4, & 5(1)(a)-(f) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985.

CONTRACT: Assignment - Foreign corporation selling and assigning all rights under Distribution Agreement entered into with defendant, a Malaysian company, to the plaintiff, another foreign corporation - Whether assignment valid under Malaysian law - Section 4 Civil Law Act 1956 - Whether notice of assignment given to defendant - Whether assignment can only be to a subsidiary of the first foreign corporation.

This was an application by the plaintiff to register a foreign Arbitrator's Award for enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985.

The defendant entered into a Distribution Agreement with Harris Corporation, an American company on 15 April 1987. Thereafter by an agreement dated 9 January 1990, Harris Corporation sold all their interest in this division of their business and assigned all their rights to the plaintiff. Products were subsequently delivered by Harris Corporation to the defendant but the defendant failed to pay the sum owed. The plaintiff then sought recourse to arbitration pursuant to the Distribution Agreement and upon the defendant's failure to appear at the hearing of the arbitration, an Award was made in favour of the plaintiff.

The defendant alleged that the assignment was void and of no effect because due notice of the assignment had not been given to the defendant and that the assignment could only be to a subsidiary of Harris Corporation. The defendant also alleged that it would be contrary to public policy to have the Convention Award enforced because the plaintiff was an Israeli registered company having 68% of its shares owned by an Israeli company. Furthermore, the defendant argued that the plaintiff was seeking a double claim by also registering the Award in the Superior Court of Columbia.

Held:

[1] Under s. 4 of the Civil Law Act 1956 for a legal assignment to be valid there must be express notice in writing given to the debtor but no formal notice is required. What is required is that information relative to the assignment shall be conveyed to the debtor and the debtor has notice of the assignment. In this case the defendant had written

notice of the assignment. The plaintiff's letter of demand for payment is in fact and in law sufficient to satisfy the requirement of express notice in writing. Furthermore, the defendant's letter of repudiation and the letters written subsequently by them to the plaintiff, the plaintiff's Attorney in the United States and to the American Arbitration Association all point to the fact that the defendant had knowledge of this assignment.

[2] There was no merit in the argument that assignment can only be to a subsidiary of Harris Corporation. On a reading of Clause 15.6 of the Distribution Agreement there is no such restriction if the company is so sold.

[3] The Malaysian Government's stand *vis-a-vis* Israel is not applicable and has no relevance to the present case and does not support the defendant's argument. The plaintiff's affidavit clearly puts the correct position that the plaintiff is a United States corporation. The plaintiff like any other company has a 68% stake in a subsidiary company engaged in development and manufacturing operations in Israel but what is important is that the products covered by the Distribution Agreement have been and would have continued to be developed, manufactured and supported from the plaintiff's United States operations. Thus the defendant's argument that it is against public policy to have this agreement enforced is rejected.

[4] The Court accepted Counsel's submission that the registration of the Award in the Superior Court of Columbia was for the protection of the plaintiff's interest and not for a double claim.

[Application allowed with costs].

Legislation referred to:
Civil Law Act 1956, s. 4
Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985, ss. 3, 4, 5(1)(a) to (f), 27

Other sources referred to:
Chitty on Contracts, 1399 *Ibid*
Halsbury's Laws of England, Vol. 6, p. 24

For the plaintiff - D.P. Naban; T/n. Lee Hishammuddin
For the defendant - Dulip Singh; T/n. Dulip Singh & Co.

JUDGMENT

Hj. Abu Mansor bin Ali J:
By the plaintiff's application in enclosure (2) the plaintiff applied to have registered a foreign judgment which was the enforcement of an Arbitrator's Award exhibit "A-6" attached to enclosure (1). At the hearing of the arbitration proceedings the respondent did not appear despite due notice.

The debt arose as a result of distribution agreement entered between the defendant and Harris Corporation. The agreement was on 15 April 1987 and signed by the plaintiff in the United States and the defendant in Kuala Lumpur. As a result of products delivered by Harris Corporation to Perkom Sdn. Bhd., the defendant became indebted to Harris Corporation in the sum of RM538,000, the sum of the Award.

Thereafter by an agreement dated the 9 January 1990 Harris Corporation sold all their interest in this division of their business and assigned all their rights to the plaintiff Harris Adacom Corporation. The said agreement underwent some amendment as in "A-3" (pages 28 - 37).

There were exchange of letters after the assignment, between the defendant and Harris Corporation, and between the plaintiff personally and the respondent. When the respondent failed to pay the debt to the plaintiff, the plaintiff then went to arbitration in accordance with Clause 15.4 (page 13) enclosure (1) of the Distributorship Agreement which reads:

> 15.4 Any dispute arising out of or relating to this Agreement, its construction or performance shall be finally settled by arbitration in accordance with the rules of the American Arbitration Association in Washington, D.C.

As stated the defendant did not appear at the arbitration and an Award was made in terms of exhibit "A-6".

Applicant's Counsel submitted that the distributorship cannot be assigned without the agreement of Harris Corporation but Harris Corporation itself can assign their rights even if it is incidental to the sale of its business and thereafter Harris Corporation informs the defendant (Perkom) of it.

After the Award the plaintiff is now taking steps to register the said Award in Malaysia under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985.

It is common ground that this is a Convention and if leave can be obtained, the Award is similarly enforceable as in s. 27 Arbitration Award and judgment may be so entered. So in the originating summons the present applicant seeks to enforce this Award and to enter judgment.

It is not disputed that the plaintiff in their application have complied with all the requirements of s. 3 and s. 4 of the 1985 Act but, however under s. 5 of the Act the enforcement of a Convention Award may be refused if the person against whom it is invoked proves one of the various factors set out therein s. 5(1)(a) to (f).

The applicant submitted that the burden is on the defendant as it is against the defendant the Convention Award is to be invoked. It is applicant's submission that the defendant have not proved the five instances set out in s. 5 for the Court to exercise its discretion not to enforce the Award.

In anticipation the applicant argued that the defendant wanted to raise that the defendant as a party was under some incapacity under s. 5(1)(a) and the defendant wants to say that it would be contrary to public policy to enforce the Award. The applicant denied that the defendant can raise these two reasons.

The defendant says that it would be contrary to public policy to have the Convention Award enforced because the plaintiff is an Israeli registered company having 68% of its shares owned by an Israeli company. I find no merit in this argument of the defendant. The defendant also contends that the plaintiff have also registered this Award in the Superior Court of Columbia and thereafter on the same day applied to this Court. There is the defendant's allegation that the assignment is invalid, void and of no effect because due notice had not been given to the defendant.

On the validity of the assignment, I find merit in the argument of the plaintiff that the parties have adopted Florida law as the governing law in the construction of their rights and obligations pertaining thereto. I accept this since this is not one of the points disputed by the defendant.

The only issue that needs to be determined is whether under Malaysian law it is valid assignment. Under s. 4 of the Civil Law Act 1956 for a legal assignment to be valid there is the requirement there must be express notice in writing given to the debtor. The position is given in **Halsbury's Laws of England** Vol. 6 page 24 which gives that the requirement of express notice in writing does not mean that a formal notice is required. In **Chitty on Contracts** 1399 *Ibid* what is required simply is that information relative to the assignment should be conveyed to the debtor and the debtor has notice of the assignment.

In this case before us I accept that the defendant had written notice of the assignment. I accept that on the authority cited above the plaintiff's letter of demand for payment dated 2 July 1990 (see Exhibit "B-2" in affidavit of Richard A. Larsen sworn on 28 July 1992) is in fact and law sufficient to satisfy the requirement of express notice in writing. That is not all of it. The defendant's letter of repudiation dated 9 March 1990 (exhibit "B-1" in affidavit of Richard A. Larsen sworn on 28 July 1992) and the letters written subsequently by them to the plaintiff, the plaintiff's Attorney in the United States and to the American Arbitration Association all point to the fact of the defendant having knowledge of this assignment.

I also hold there was no merit in the argument that assignment can only be to a subsidiary of Harris. On a reading of Clause 15.6 in the circumstances there is no such restriction if so sold. The Court makes a finding that at the material time of assignment, there was in existence a debt and the assignment was a valid assignment. I reject this defendant's contention that the assignment was invalid, ineffective and void.

On the allegation that the plaintiff is an Israeli based company and, therefore, it is against public policy to have the Award enforced, it is common ground that, in the foreign office declaration produced to this Court, if it so found that the plaintiff is an Israeli based company, it is against public policy to enforce it as trade with Israel is prohibited.

Is the fact so? This Court need only refer to exhibit "P-7" referred to in the affidavit of Paul Owen Suttie at page 14 that the Malaysian Government's stand *vis-a-vis* the state Israel is not applicable and has no relevance in our present case and do not support the defendant's argument. I find merit in the statement of L.J. Zito of Harris Adacom, in a letter to the defendant, dated 12 July 1990 (Exhibit "A-5") in the affidavit of D.P. Naban, enclosure (1) clearly puts the correct position that the plaintiffs are a United States Corporation. The plaintiff like any other company have a 68% stake in subsidiary company engaged in development and manufacturing operations in Israel but what is important for our consideration, and to be clear about, and the Court is clear on this, that the products covered by the Distribution Agreement have been and would have continued to be developed, manufactured and supported from the plaintiff's United States operation. For the reason stated above, I reject the defendant's argument that it is against public policy to have this agreement enforced.

And lastly as for the contention that the plaintiff is seeking double payment by having the Award registered also in the Superior Court of Columbia, I accept Counsel's submission it is done only for the protection of plaintiff's interest not for double claim.

The reasons I stated above, I allow this application of the applicant with costs to the applicant.